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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 22.

IRVING TRUST COMPANY, as Trustee in Bankruptcy of Outfitters Operating Realty Co., Inc., a Delaware corporation,

Petitioner,

—against—

A. W. PERRY, INC., a Massachusetts corporation,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF OF PETITIONER.

Opinions Below.

The opinion of the Referee (R. 13-23) is not reported in the Federal Reporter or Supplement.

The opinion of the District Court (per Goddard, *J.*) (R. 26) is not reported in the Federal Reporter or Supplement.

The opinion of the Circuit Court of Appeals (R. 31-34) is reported at 69 F. (2d) 90.

Jurisdiction.

The decision of the Circuit Court of Appeals for the Second Circuit, here to be reviewed, was filed on February 20, 1934 (R. 34, 35).

The jurisdiction of this Court was invoked under Section 240-a of the Judicial Code, as amended by the Act of February 13, 1925 (U. S. C., Title 28, Section 347 (a)).

Certiorari was granted by this Court on May 14, 1934 (R. 37).

Statement of Facts.

The petitioner is the trustee in bankruptcy of Outfitters Operating Realty Co., Inc. (R. 1).

In 1929 the respondent, A. W. Perry, Inc., leased to the bankrupt corporation, Outfitters Operating Realty Co., Inc., certain premises at No. 459 Washington Street, Boston, Massachusetts, for a term ending December 31, 1945, at a rental starting at the rate of $35,000 per annum for the first ten (10) months, and progressing to the rate of $39,805.00 per annum for the latter years of the demise, plus certain other charges therein specified (R. 6-7).

The lease contained the following provision (R. 10):

> "* * * and, for the more effectual securing to the Lessor of the rent and other payments herein provided, it is agreed as a further condition of this lease that the filing of any petition in bankruptcy or insolvency by or against the Lessee shall be deemed to constitute a breach of this lease, and thereupon, *ipso facto* and without entry or other action by the Lessor, this lease shall become and be terminated; and, notwithstanding any other provisions of this lease, the Lessor shall forthwith upon such termination be entitled to recover damages for such breach in an amount equal to the amount of the rent reserved in this lease for the residue of the term hereof less the fair rental value of the premises for the residue of said term."

The bankrupt filed a voluntary petition in bankruptcy in the United States District Court for the Southern District of New York on September 30, 1932, and was adjudicated a bankrupt on that date (R. 1).

The respondent on March 29, 1933 (R. 1) filed a claim in the bankruptcy proceeding for $177,788.00, claiming that amount to be its so-called damages to which it was entitled under the provision of the lease above set forth, although the proof of claim affords no explanation of the computation (R. 4-5).

The claim was expunged by Referee Kurtz (R. 13-23), whose order was affirmed by the District Court (Goddard, *J.*) (R. 26-27).

The orders of the Referee and of the District Court were, however, reversed by the Circuit Court of Appeals with an opinion by L. Hand, *J.* (R. 31-34) in which it was said that the decision of this Court in *Manhattan Properties, Inc.* v. *Irving Trust Company*, 291 U. S. 320, finally determined that claims for future rent are ordinarily not provable "and can become so, if at all, only by virtue of special clauses"; that the question in this case presented was whether the instant clause would serve; that the possible validity of the instant clause "was specifically reserved" in this Court's opinion in the *Manhattan Properties* case; that while the rule of damages specified in said clause, in the absence of a specific covenant by the parties therefor, would not be acceptable in bankruptcy, the express promise of the lessee in the lease to pay such damages is lawful and gives rise to a provable claim; but that, to avoid the possibility of the promise here made constituting a penalty, it was to be interpreted as providing for the discounting of the minuend, *i. e.*, the rent reserved for the residue of the term. The Circuit Court of Appeals thereupon held that the claim was provable, interpreting the lease as providing

for damages in "the sum of the discounted series of installments, each made up of the rent reserved, less the fair rental value for that period."

Questions Presented.

A.—Can a landlord and tenant turn an otherwise non-provable claim into a provable claim merely by stipulating that, in the event of the bankruptcy of the tenant, the lease shall *ipso facto* terminate and the tenant thereupon be liable to pay liquidated damages?

B.—Assuming that such a stipulation may give rise to a provable claim, is a promise by the lessee to pay as such liquidated damages an amount equal to the rent reserved in the lease for the residue of the term, less the fair rental value of the premises for the residue of the term, nevertheless unenforceable as a penalty and for uncertainty?

Specification of Assigned Errors To Be Urged.

All of the assigned errors are intended to be urged, as follows, to wit:

The Circuit Court of Appeals erred:

(1) In reversing the decree of the District Court.

(2) In holding that the proof of claim of the respondent set forth a provable claim, and that it should be liquidated and allowed.

(3) In holding that a provision in a lease for real property, to the effect that in the event of the filing of a petition in bankruptcy by or against the lessee the lease

should *ipso facto* terminate, and the lessee thereupon become liable to pay to the lessor damages in an amount equal to the amount of the rent reserved in the lease for the residue of the term, less the fair rental value of the premises for the residue of said term, gave rise to a provable claim in bankruptcy.

(4) In holding that such provision gave rise to a provable claim in bankruptcy notwithstanding the decision of this Court in *Manhattan Properties, Inc.* v. *Irving Trust Company,* 291 U. S. 320, inasmuch as it is for damages for breach of a covenant to pay rent.

(5) In holding that such provision gave rise to a provable claim in bankruptcy notwithstanding the decision of this Court in *Kothe* v. *R. C. Taylor Trust,* 280 U. S. 224, inasmuch as the minuend clause of the formula there set forth sounds in penalty.

(6) In holding that such provision gave rise to a provable claim in bankruptcy notwithstanding the decision of this Court in *Maynard* v. *Elliott,* 283 U. S. 273, inasmuch as the subtrahend clause of the formula there set forth is such as to render valuation impossible.

Statute Involved.

Section 63 of the Bankruptcy Act provides:

> "Debts which may be proved. (a) Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such

as were not then payable and did not bear interest; * * * (4) founded upon an open account, or upon a contract express or implied; * * * (7) claims for damages respecting executory contracts including future rents whether the bankrupt be an individual or a corporation, but the claim of a landlord for injury resulting from the rejection by the trustee of an unexpired lease of real estate or for damages or indemnity under a covenant contained in such lease shall in no event be allowed in an amount exceeding the rent reserved by the lease, without acceleration, for the year next succeeding the date of the surrender of the premises plus an amount equal to the unpaid rent accrued up to said date: Provided, That the court shall scrutinize the circumstances of an assignment of future rent claims and the amount of the consideration paid for such assignment in determining the amount of damages allowed assignee hereunder: Provided further, That the provisions of this clause (7) shall apply to estates pending at the time of the enactment of this amendatory Act, in which the time for filing such claims has not expired.*

"(b) **Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate."

Section 1 (11) provides:

"'debt' shall include any debt, demand, or claim provable in bankruptcy."

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* Clause (7) was added, subsequent to the granting of the petition herein, by the Act of June 7, 1934, with the exception of the closing words, "in which the time for filing such claims has not expired". These closing words were later added by the Act of June 18, 1934.

** While the Act of June 7, 1934 added a new paragraph (b) to Section 63 to precede the old paragraph "(b)", the amendment did not change the symbol of the old paragraph, with the result that there are now two paragraphs in the Section indicated by the letter "(b)".

Section 17 provides:

> "A discharge in bankruptcy shall release a bankrupt from all of his provable debts * * *"

with exceptions not here material.

Section 57 (n) provides:

> "Claims shall not be proved against a bankrupt estate subsequent to six months after the adjudication; * * *"

(Act of July 1, 1898, Sections 1, 17, 57 and 63; 30 Stat. 562, as amended; U. S. C., Title 11, Sections 1, 35, 93 and 103.)

Summary of Argument.

I.

In the recent case of *Manhattan Properties, Inc.* v. *Irving Trust Company,* 291 U. S. 320, this Court confirmed the long established doctrine that claims for rent or for damages for breach of rent covenants were not provable in bankruptcy. That rule was not to be avoided by mere resort to an express agreement to pay liquidated damages upon a stipulated *ipso facto* termination of the lease in the event of the filing of a petition in bankruptcy by or against the tenant, a conclusion confirmed by the recent legislative history of the Bankruptcy Act, and more particularly the amendments enacted in 1934.

(1) The *Manhattan Properties* decision.

(2) The rationale of the opinion below in the instant case is based upon the circumstance of an express covenant to pay damages.

(3) The result below is contrary to the trend of the decisions of this Court.

(4) The result below is likewise contrary to the trend of the decisions of the lower federal courts.

(5) Nor is there any logical reason why the inclusion of an express covenant should have created an exception to the general rule.

(6) Recent legislative history confirms it to have been the intention of Congress that there should be no such exception to the general rule.

(a) The Context of the Act of June 7, 1934.

(b) Congressional Reports.

(c) The Act of June 18, 1934.

II.

All other considerations apart, the instant clause would not, in any event, give rise to a provable claim.

(1) The minuend clause sounds in penalty and is therefore unacceptable.

(2) Nor is the subtrahend clause susceptible of valuation, and therefore of application.

(a) There is involved a month by month inquiry for the balance of the term, necessitating resort to speculation.

(b) Impossibility of valuation also ensues because of the lease provisions for termination and abatement of rent.

Argument.

I.

In the recent case of *Manhattan Properties Inc.* v. *Irving Trust Company*, this Court confirmed the long established doctrine that claims for rent or for damages for breach of rent covenants were not provable in bankruptcy. That rule was not to be avoided by mere resort to an express agreement to pay liquidated damages upon a stipulated *ipso facto* termination of the lease in the event of the filing of a petition in bankruptcy by or against the tenant, a conclusion confirmed by the recent legislative history of the Bankruptcy Act, and more particularly the amendments enacted in 1934.

Can a landlord and tenant turn an otherwise non-provable claim into a provable claim merely by stipulating that, in the event of bankruptcy of the tenant, the lease shall *ipso facto* terminate and the tenant thereupon be liable to pay liquidated damages?

This question, here presented, arises upon the following covenant in the lease at bar (R. 10):

> "* * * and, for the more effectual securing to the Lessor of the rent and other payments herein provided, it is agreed as a further condition of this lease that the filing of any petition in bankruptcy or insolvency by or against the Lessee shall be deemed to constitute a breach of this lease, and thereupon, *ipso facto* and without entry or other action by the Lessor, this lease shall become and be terminated; and, notwithstanding any other provisions of this lease, the Lessor shall forthwith upon such termination be entitled to recover damages for such breach in an amount equal to the amount of the rent

reserved in this lease for the residue of the term hereof less the fair rental value of the premises for the residue of said term."

The Circuit Court of Appeals, reversing the Referee and the District Court below, has held that this covenant gave rise to a provable claim, predicating its decision upon the ground of the presence of an express promise.

(1) *The Manhattan Properties Decision.*

The point of departure in any discussion of the provability of claims arising out of leases, either for rent or for damages for breach of a covenant to pay rent, is this Court's recent decision in the case of *Manhattan Properties, Inc.* v. *Irving Trust Company,* 291 U. S. 320.

Prior to that decision there had never been any express determination by this Court of the question of the provability of such claims. There had, however, grown up a great body of decisions in the lower federal courts wherein it was uniformly held that such claims were not provable. These decisions had been referred to with approval by this Court. Congress had remained inert although seven times during that period of time. (*Cf. Manhattan Properties* decision, at pp. 335-336.)

In consequence, this Court said that only compelling language in the statute itself would warrant the rejection of a construction so long and so generally accepted (p. 336).

It thereupon held that claims for future rent were not provable.

While it may be true that it was not dealing with a claim for damages for breach of a covenant to pay rent (for the indemnification clauses there at bar may not have been, strictly speaking, such covenants), the discussion in the Court's opinion of the historical and judicial genesis of the rule made no distinction between claims for future

rent and claims for damages for breach of covenant to pay rent. It not only made no distinction between the two, but expressly considered them to be correlative. We quote from the Court's opinion (pp. 333 *et seq.*):

> "The Act of March 2, 1867, §19, 14 Stat. 517, 525, authorized the proof and liquidation of contingent claims, and also proof of a claim for a proportionate part of any rent up to the date of bankruptcy. The courts uniformly held that claims for future rent or for *damages for breach of covenant to pay rent* were not provable under the act, though differing as to the reason; some holding them not contingent claims within the statutory definition, and others thinking the express permission of proof for rent past due at the date of bankruptcy impliedly excluded claims for rents thereafter falling due. (Cases cited.)
>
> "In the year 1880 Circuit Judge John Lowell, of Massachusetts, at the suggestion of several mercantile associations, drafted a proposed bankruptcy law, which, after revision, was introduced in Congress, but failed of passage. It contained a section (60) which allowed proof of damages sustained by reason of the trustee's rejection of a lease, and another (61) permitting any creditor to compel the trustee to elect to accept or decline any lease, and upon declination the landlord was to have *'any damages* he shall suffer thereby assessed, as the court shall direct, and prove the amount as a debt in the bankruptcy'.
>
> "After much agitation by trade associations and commercial bodies, and after prolonged consideration (see *Schall* v. *Camors,* 251 U. S. 239, 250), Congress adopted the Act now in force, that of July 1, 1898. The committee reports do not disclose the origin of the phraseology of §63, nor discuss the classes of claims intended to be included. But

> it is clear that Congress was familiar with analogous sections of the earlier Acts and the court decisions interpreting them, and with the text of the Lowell Bill and the English act then in force. *In view of the extended consideration and discussion which preceded the passage of the Act, the failure to include a provision for claims for loss of rent or for damages consequent on the abrogation of leases, is significant of an intent not to depart from the precedents disallowing them. Schall* v. *Camors, supra,* pp. 250, 251." (Italics by counsel.)

Among the cases thereupon cited by this Court as instances in which rent claims had been held non-provable, were *In re Roth & Appel,* 181 Fed. 667 and *Wells* v. *Twenty-First Street Realty Co.,* 12 F. (2d) 237*, where were presented claims for damages as distinguished from claims for future rent.

It is manifest, therefore, that regardless of the scope of the precise holding in the *Manhattan Properties* case, this Court had no intention of distinguishing generically between claims for future rent and claims for damages for breach of rent covenants**, nor is there any basis in the history of the doctrine, as is manifest from the opinion itself, to justify a distinction.

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* The facts of *Wells* v. *Twenty-First Street Realty Co.* are more fully reported in the decision in the District Court, *sub nom. In re Bissinger Co.,* 5 F. (2d) 106.

** We do not conceive that certain comments of the Court in its opinion were intended to constitute any qualification of the general doctrine enunciated. We refer to comments at pages 337 and 338. At page 337 the Court remarks of the indemnity covenants there at bar that they do not provide for liquidation of damages, nor indeed for any right to damages for breach of the covenant to pay rent. At page 338 the Court says:

> "Such a covenant is not, as petitioners contend, the equivalent of an agreement that bankruptcy shall be a breach of the lease and the consequent damages to the lessor be measured by the difference between the present value of the remainder of the term and the total rent to fall due in the future."

Manifestly, these remarks were made in response to contentions of counsel as is apparent not only from the opinion itself, but also from that part of the summary of the argument of counsel printed at pages 324-325.

(2) *The Rationale of the Opinion Below in the Instant Case is Based Upon the Circumstance of an Express Covenant to pay Damages.*

Not only did this Court in the *Manhattan Properties* case make no distinction between claims for future rent and claims for damages for breach of rent covenants, but the court below in the instant case likewise felt that no distinction was to be made (see R. 32-33).

In fact, apropos claims for damages for breach of rent covenants it said (R. 33):

> "It is the uncertainty in fact of the loss that invalidates the claim; that is not remedied by an approximation which the law will accept in other connections."

Clearly, the court below conceived that claims for rent and claims for damages for breach of rent covenants stood on the same basis; both were unacceptable. What then was the basis for its decision?

Simply that there had been included in the lease an express covenant to pay damages.* The court below regarded the existence of such a covenant as a sufficient justification for the creation of an exception to the general rule, for it went on to say (R. 33):

> "But when the parties have agreed that the lessee shall pay a sum to be ascertained by an accessible standard, the bankruptcy court is not liquidating a future loss at all; in its place the parties have substituted a promise, which does not look to the future,

---

* Of the provision that the lease should *ipso facto* terminate in the event of the filing of a petition in bankruptcy, the court below briefly remarks that in consequence the claim "is not contingent in right" (R. 32). In other words, if there would be otherwise a provable claim, it would be due at the time of the filing of the petition. The court below does not suggest that that fact alone would give rise to a provable claim nor could such a result be conformed to the holding of this Court in *Gardiner* v. *Butler & Co.*, 245 U. S. 603, 605. See also *Wells* v. *Twenty-first Street Realty Co.*, *supra*.

> which is to pay the difference between two amounts presently ascertainable. The only question is whether that promise is lawful, whether it makes a contract, and as to that we have it on the highest authority that it liquidates 'the damages upon a footing familiar and fair'. *Filene's Sons* v. *Weed*, 245 U. S. 597, 602."

In other words, the court below has said, that while the measure of damages stipulated at bar would have been only a forecast, and so unacceptable, in the absence of an express covenant, the stipulation of the parties to pay, although by an otherwise unacceptable standard, renders the claim acceptable.

No authority was cited in support of this novel circumscription of the rent doctrine. The reference by the court below to *William Filene's Sons Co.* v. *Weed* was limited to the fairness of the measure of damages expressed.

That the court below remained in grave doubt, even after its decision, as to the correctness of the result in the instant case, would appear from the following comment in its opinion in *Wright* v. *Irving Trust Company*, 70 F. (2d) 245, a case decided subsequently to that at bar, where the same judge who wrote the opinion below said, in speaking of the *Manhattan Properties* decision (pp. 245-246):

> "As we understand it, the invalidity of rent claims is not deduced from the statute, but is a historical exception; the earlier acts by judicial construction had refused to allow claims for future rents, even when contingent claims were provable; although such claims are now generally provable, not only did Congress fail to include rents in 1898, but it continued inert through many amendments, in spite of a number of decisions in accord with the earlier interpretation. *It is not altogether plain how we ought to circumscribe such a doctrine; how far it should be limited to the occasions which have heretofore arisen;*

> *how far we should rationalize it in the interest of convenience in application."* (Italics by counsel.)

(3) *The Result Below is Contrary to the Trend of the Decisions of this Court.*

As we have said, the philosophy of the *Manhattan Properties* case was that claims predicated upon rent stood apart as a matter of well-defined historical development, acquiesced in by Congress. The distinction being historical, coordination of the doctrine with cases affecting personalty is futile. Sixteen years ago this Court said in *Gardiner* v. *Butler & Co.*, 245 U. S. 603, 605:

> "But the law as to leases is not a matter of logic *in vacuo;* it is a matter of history that has not forgotten Lord Coke."

In that case, an equity receivership, this Court denied relief for damages upon a basis somewhat similar to that at bar, where the lease did not contain any clause providing for such damages.

In the same equity proceeding, and as a companion decision, this Court rendered its opinion in *William Filene's Sons Co.* v. *Weed, supra.* There was there an express covenant for the payment of damages upon a real estate lease, to wit, the difference between the rental value at the date of entry and the rent reserved, which, having been contracted for, the Court felt should be paid.

This conclusion at first blush would appear to support the result here at bar. However, an accurate analysis of the *Weed* case and proper regard for the careful language of the eminent jurist who wrote the opinion, point to exactly the contrary result in the instant case.

The claimant in that case had subleased the property there involved to the defendant corporation in receivership, under a lease which required the sub-lessee to pay as rent all sums payable by the lessor under the over-lease to it,

plus twenty thousand dollars a year for the residue of the term. The lease contained the usual provision for re-entry in the case of failure to perform any covenant, of bankruptcy or of a receiver being appointed and not discharged within ninety days, and provided that upon a termination of the lease the lessee should pay the lessor said sum of twenty thousand dollars yearly for the residue of the term and as damages the difference between the rental value and the rent and other payments named in the lease for the residue of the term, less the yearly payment of twenty thousand dollars. The lessor filed a claim in the receivership proceeding for the yearly payments, discounted, and the stipulated damages, which was expunged by the lower courts which, in the language of this Court (p. 600),

> "were of opinion that the twenty thousand dollars were simply an addition to the rent, that the provisions for payment upon termination of the lease were an attempt to secure a preference by accelerating the instalments and also were in the nature of a penalty, *that the analogy of bankruptcy applied,* and that the claim for the above-mentioned items could not be allowed. The Circuit Court of Appeals seems to have considered also that the filing of the bill had the same effect as a petition in bankruptcy in stopping claims that like this were not provable at that date." (Italics ours.)

In reversing the decree below this Court said (p. 601):

> "We perceive no ground that would justify the rejection of the petitioner's proof for the whole sum subject to the discount agreed. Certainly the fact that the termination of the lease happened after the filing of the bill has no such effect, although the sum was not presently payable until then. When a statutory system is administered the only question for the courts is what the statutes prescribe. *But when the*

courts without statute take possession of all the assets of a corporation under a bill like the present and so make it impossible to collect debts except from the court's hands, they have no warrant for excluding creditors, or for introducing supposed equities other than those determined by the contracts that the debtor was content to make and the creditors to accept. In order to make a distribution possible they must of necessity limit the time for the proof of claims. But they have no authority to give to the filing of the bill the effect of the filing of a petition in bankruptcy so as to exclude any previously made and lawful claim that matures within a reasonable time before distribution can be made. *Pennsylvania Steel Co.* v. *New York City Ry. Co.*, 198 Fed. Rep. 721, 740, 741. Of course it does not matter that the claim was perfected by the petitioner's act, after a default in the rent. The receivers would not, and Butler & Company could not pay it, so that all agree that the petitioner's course was the prudent and only possible course to take, as it was the course that was contemplated by the covenant in the lease. * * *

"The rest of the claim is for damages *ultra* the twenty thousand dollars a year—the difference between the rental value at the date of entry and the rent reserved, less the amount received under the twenty thousand dollar clause. *This also was contracted for* and we see no reason why it should not be paid." (Italics ours.)

We have quoted at some length from the opinion in order to make manifest the *ratio decidendi* of that case.

It was clearly the Court's holding that that case was to be distinguished from a bankruptcy proceeding, for the reason that, having taken possession of all of the assets of the defendant corporation, not under a statute but under a bill in equity, the courts "have no warrant for excluding cred-

itors, or for introducing supposed equities other than those determined by the contracts that the debtor was content to make and the creditors to accept". In other words, it having been so covenanted between the parties, the equity court was compelled to give effect to the agreement made. In consequence, it could not stop short at the date of the filing of the bill in equity, nor could it refuse to render damages (as it did in the companion *Gardiner* case), because a claim therefor "*also* was contracted for". The result with respect to the claim for damages cannot be divorced from the general comment that courts of equity "have no warrant for excluding creditors, or for introducing supposed equities other than those determined by the contracts that the debtor was content to make and the creditors to accept". This is obvious from the phrase with respect to damages,—"This *also* was contracted for".

The conclusion is inescapable that a like result would not have been achieved in bankruptcy. We have this Court's own authority in respect of the effect of the filing of the petition, for in the *Manhattan Properties* decision, *supra*, this Court excluded claims based upon covenants for indemnification effective only after the date of the filing of the petition in bankruptcy. No logical warrant exists for postulating a different result in respect of the claim for damages, since both are interwoven by the express language of the opinion itself in the *Weed* case.

In *Central Trust Co.* v. *Chicago Auditorium Association*, 240 U. S. 581, there was held provable a claim for damages upon a basis similar to that at bar, with respect to a contract for the baggage and delivery privilege of the Auditorium Hotel in Chicago, even though the contract contained no express covenant for liquidation of damages. The Court, however, was careful to distinguish between that case and a case "arising out of the relation of landlord and tenant", mentioning among cases of the latter class *Watson* v. *Mer-*

rill, 136 Fed. 359, where was involved a claim for damages for breach of a rent covenant (pp. 589-590).

Again, in *Maynard* v. *Elliott,* 283 U. S. 273, this Court sanctioned a claim against the bankrupt, as an endorser, upon certain notes not yet matured or dishonored, but again adverted to the fact that some contingent claims are deemed not provable, citing as an example *Atkins* v. *Wilcox,* 105 Fed. 595, involving a claim for notes given for future rent.

We have heretofore referred to four leading decisions of this Court, *i. e., Gardiner* v. *Butler, Wm. Filene's Sons Co.* v. *Weed, Central Trust Co.* v. *Chicago Auditorium Association,* and *Maynard* v. *Elliott.*

These four decisions are all mutually consistent, and, with the *Manhattan Properties* decision, may be rationalized as follows:

In equity receivership proceedings the courts, not dealing with a statutory system, but acting purely by virtue of their inherent chancery powers, must give effect to contracts as written by the parties.

In bankruptcy the court is dealing with a statutory system, and can allow only such claims as the statute permits.

The bankruptcy statute generally permits proofs of claim for anticipatory breaches of contracts, but, as a matter of historical distinction sanctioned by long legislative history, claims for rent and claims for damages for breach of covenants to pay rent have not been provable.*

In equity there may be a distinction between the making and the absence of a promise. In bankruptcy the distinction has to do with the *subject-matter.*

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* By virtue of the amendments effected by the Acts of June 7, 1934 and June 18, 1934, rent claims hereafter will be provable within rigid limitations. These amendments and their effect as confirming the result of the *Manhattan Properties* decision are hereafter considered (pp. 26-33).

(4) *The Result Below is Likewise Contrary to the Trend of the Decisions of the Lower Federal Courts.*

The distinction in bankruptcy above adverted to, that is, *of type and not of promise,* was pointed out almost thirty years ago in *Watson* v. *Merrill, supra,* in an opinion of the Circuit Court of Appeals for the Eighth Circuit, written by the late Judge Sanborn, Mr. Justice (then Circuit Judge) Van Devanter sitting, where it was said (p. 360):

> "It is, however, the *nature* of the claim, and not the name which is applied to it, *that conditions its provability in bankruptcy.*" (Italics ours.)

Exemplification of this distinction in bankruptcy is to be found in the cases dealing with promissory notes not matured at the date of the filing of the petition in bankruptcy. Notes given for rent have stood apart.

The Circuit Court of Appeals for the Seventh Circuit held, in *In re Wisconsin Engine Co.,* 234 Fed. 281, that negotiatiable promissory notes maturing subsequent to bankruptcy, given pursuant to a patent license agreement, gave rise to a provable claim, saying at page 284:

> "There is no guaranty that, if royalties shall in fact become due, they shall amount to at least $22,500 for the period; there is an absolute undertaking that this amount shall be paid. While the mere giving of notes to evidence or in prepayment of a clearly conditional obligation would not annul the condition *or make an otherwise unprovable claim allowable in bankruptcy* (*Atkins* v. *Wilcox,* 105 Fed. 595, 44 C. C. A. 626, 53 L. R. A. 118), the provision that notes should be given and that they should be negotiable is additional evidence tending to resolve any doubt as to the intention of the parties that the amount therein stated was to be payable in any event. That

> the notes were not in fact sold is of no moment. The parties necessarily contemplated that they might be negotiated." (Italics ours.)

The case referred to by the court, *Atkins* v. *Wilcox*, presents the antithesis. There notes were given for future rent. The tenant having become bankrupt during the term of the lease, a claim was filed by the landlord for the full amount of the notes, including those for months subsequent to the bankruptcy.

The Circuit Court of Appeals expunged the claim, remarking at page 598:

> "In the opinions of the referees and of the judges of the courts of bankruptcy, just referred to, there is a marked unanimity to the extent that rent to accrue in the future, if it can be called a debt, is a contingent one, both as to its amount and as to its very existence, and that there is no provision in the act of 1898 which allows proof of such debts."

It is manifest from the opinion in *Atkins* v. *Wilcox*, that it was the intention of the parties that these notes should be paid in any event since the lease contained the following provision:

> "Should the lessee at any time fail to pay the rent punctually at maturity as stipulated, the rent for the whole unexpired time of this lease shall, without putting said lessee in default, at once become due and exigible" (p. 597).

In both the *Wisconsin Engine Co.* case and in *Atkins* v. *Wilcox* it was the intention of the parties that the amount of the notes should be payable in any event. Yet, in the former case the notes were held to constitute a basis for a provable claim; in the latter case, which was expressly

referred to in the *Wisconsin Engine* case, the notes were held *not* to afford a basis for a provable claim.

We submit that the signing of the notes was as much an express covenant to pay as the language contained in the lease at bar. Yet the test adopted in the two cases just cited was one of type and not of promise. Where there was not involved a non-provable type of claim, the promise contained in the notes was enforced. Where the case did involve a non-provable type, the promise was not enforced, the court pointing out in the *Wisconsin Engine* case that the giving of notes "would not * * * make an otherwise unprovable claim allowable in bankruptcy" (p. 284).

The decision in *Atkins* v. *Wilcox,* which was rendered shortly after the enactment of the Act of 1898, and while its interpretation was unsettled, still remains good law. It has been referred to by this Court in *Maynard* v. *Elliott, supra,* and *Manhattan Properties, Inc.* v. *Irving Trust Company, supra.*

Where the question has arisen, *Atkins* v. *Wilcox* has been consistently followed by the lower federal courts. See *In re Hays, Foster & Ward Co.,* 117 Fed. 879 (D. C. W. D. Kentucky, 1902); *In re Sterne & Levi,* 30 A. B. R. 915 (not officially reported; Referee's Opinion U. S. D. C. E. D. Texas, 1912). The same result was reached in *In re Curtis,* 109 La. 171, 9 A. B. R. 286, a case arising in the Supreme Court of Louisiana. In these cases the courts refused relief to the claimant, in the face of an express promise to pay, solely because the notes were given for future rent. In other words, the courts disregarded the element of promise, and regarded solely the type of claim.*

* There is the added factor in the instant case that, unlike the note cases just referred to, the provision at bar was written solely in contemplation of bankruptcy, when the lessee's assets would be distributed to his creditors, and where the lessee himself, in the language of this Court in *Kothe* v. *R. C. Taylor Trust,* 280 U. S. 224, 226, "had little, if any, immediate concern with the amount of the claim to be presented."

As was pointed out in the *Manhattan Properties* decision, it was the uniform holding of Federal courts that claims for *damages* consequent on the abrogation of leases (as well as claims for rent) were not provable in bankruptcy. Such were the holdings in *In re Roth & Appell, supra*; *In re Blum Bros. Co.*, 55 F. (2d) 723 (D. C. S. D. Ohio); *Watson* v. *Merrill, supra*; *In re Service Appliance Co.*, 45 F. (2d) 884 (D. C. N. D. N. Y.); *Matter of Bliss Auto Sales Company*, 22 A. B. R., N. S. 44 (not officially reported; D. C. N. D. Ohio, Western Division), and *Wells* v. *Twenty-First Street Realty Co., supra.*

In *Matter of Bliss Auto Sales Company*, we find the explicit holding that even an express covenant will not create an exception in a rent case. There the lease contained a covenant that, if the lessee should be adjudged a bankrupt, the lessor might re-enter, and the "lessor shall have the right to recover from the lessee any and all damages which it may sustain by reason of the failure on the part of the lessee to complete and carry out the terms and conditions hereof." It was expressly contended by counsel that the existence of this covenant was a factor distinguishing that case from the usual rent case. It was, nevertheless, held that the claim for damages for the breach of the lease was not provable.

It is quite obvious that the *Bliss Auto Sales Company* case might readily have been disposed of as were the claims in the *Manhattan Properties* case, upon the ground that the covenant for damages could not become effective until after the date of the filing of the bankruptcy petition. No such approach was adopted by the court. It proceeded solely upon the basis that, being a claim for damages for rent, it was a type of claim which was not provable in bankruptcy, the inevitable result being a disregard of the express covenant of the lease on that sole ground.

It was remarked, by way of dictum, in *Watson* v. *Merrill, supra* (p. 362):

> "Moreover, if by *contract* or by virtue of legal proceedings the lessor became entitled to the possession of the premises, and also to the difference between the amount which he might secure from another tenant, or the rental value of the leasehold, and the rents reserved, that amount would always be uncertain and contingent upon future events." (Italics ours.)

The Circuit Court of Appeals for the 1st Circuit in *R. C. Taylor Trust* v. *Kothe,* 30 F. (2d) 77, gave effect to a provision of a covenant in a lease which provided that, in the event of bankruptcy, it should *ipso facto* terminate and the lessor should forthwith "be entitled to recover damages for such breach in an amount equal to the amount of the rent reserved in this lease for the residue of the term hereof." The prevailing opinion, however, contains no discussion of the point at issue, but concerns itself solely with the question as to whether the claim was provable because not arising until the filing of the petition, and whether or not the measure of damages constituted a penalty. That case was reversed by this Court, *sub nom. Kothe* v. *R. C. Taylor Trust, supra,* on the sole ground that the provision did constitute a penalty. That this Court did not advert to the provability of the claim generally as a matter of bankruptcy law can create no inference one way or the other. The decision preceded the *Manhattan Properties* case, and there was no reason why this Court should then discuss the larger question of the provability of rent claims (which it had then not yet decided), much less the smaller question of the effectiveness of the express covenant, in view of the circumstance that under no consideration could the claim there presented be allowed.

The trend of the lower federal courts has therefore been to condemn claims for damages for breach of rent covenants as well as claims for future rents, and to give no effectiveness to a covenant in the lease for the payment of damages.

(5) *Nor Is There Any Logical Reason Why the Inclusion of an Express Covenant Should Have Created an Exception to the General Rule.*

Prior to the *Manhattan Properties* case, a frequently ascribed reason for the principle denying the provability of rent claims was their contingency. *Atkins* v. *Wilcox, supra, In re Roth & Appell, supra*; and see *Maynard* v. *Elliott, supra*, at page 278.

The *Manhattan Properties* decision rests the doctrine upon historical grounds, the view thereafter taken by the court below in *Wright* v. *Irving Trust Company, supra.*

In seeming consistency with these principles the opinion below said of the formula in the instant lease:

> "If the calculation be too contingent for a bankruptcy claim when there is no covenant, why is there* not when there is? This argument loses sight of the real objection to allowing the claim when damages have not been liquidated. That is not because the rule for measuring damages is too vague or uncertain to be manageable in bankruptcy; but that, though it is the best approximation available, it is still only a forecast, and a forecast in these circumstances will not do for bankruptcy which is more rigid as to such issues than other proceedings, an action at law, for example. It is the uncertainty in fact of the loss that invalidates the claim; that is not remedied by an approximation which the law will accept in other connections." (R. 33).

* So in original.

What the court below must have meant by this language was that a measure of damages of the type at bar, when not expressly covenanted for, would not be enforced in bankruptcy, not because it was necessarily incapable of ascertainment, but because it was barred by the arbitrary differences existing in bankruptcy.

The making of an express promise to pay upon the otherwise condemned basis would seem to afford no justification for tempering the historical rigidity of the bankruptcy rule. The promise neither facilitates the operation of the machinery of the bankruptcy courts, nor changes the nature of the claim proposed for allowance.

The rule is founded upon an historical distinction between claims affecting landlord and tenant, and those affecting other relationships. Under such circumstances there is no reasonable justification, nor can any possible basis be found in the historical sanction for the rule, for disregarding the peculiarities of the landlord and tenant relationship simply because recourse has been had to an express covenant. Adhesion to such a distinction would be so startling as to be justified only by the most cogent reasoning and statutory and judicial warrant. All are lacking.

(6) *Recent Legislative History Confirms It to Have Been the Intention of Congress That There Should Be no Such Exception to the General Rule.*

Prior to the Act of March 3d, 1933 (47 Stat. 1467), which added to the Bankruptcy Act sections 73 to 76 inclusive, there was no specific mention in the Bankruptcy Act of claims for rent or for damages for breach of a covenant to pay rent. Section 74(a), which was one of the sections added by the Act of March 3d, 1933, provides:

> "* * * A claim for future rent shall constitute a provable debt and shall be liquidated under section 63(b) of this Act."

In response to the contention that this provision was merely declaratory of the law as understood by Congress, this Court said in the *Manhattan Properties* decision (at p. 337):

> "Sections 73 to 76 inclusive were enacted to permit extensions and compositions not theretofore possible. They apply only to individuals. It is highly unlikely that if the quoted sentence had been intended as an amendment of §63(a) it would have been placed in context dealing only with the novel procedure authorized by the new sections. Moreover, the discussion on the floor of the Senate relative to the insertion of the sentence, indicates that it was not intended to alter §63(a) as it then stood. The petitioners insist the clause is declaratory of the law, as understood by the Congress; but there is no evidence to support this view, and it is inconsistent with the long standing contrary judicial construction."

Subsequent to the decision in the *Manhattan Properties* case (handed down February 5, 1934) further substantial amendments to the Bankruptcy Act were made by Congress by the Act of June 7, 1934.* This Act, as here pertinent, added two amendments to the Bankruptcy Act.

One was an entirely new section known as section 77B, which made provision for the reorganization of corporations. Sub-section (b) thereof provides:

> "The claim of a landlord for injury resulting from the rejection of an unexpired lease of real estate or for damages or indemnity under a covenant contained in such lease shall be treated as a claim ranking on a parity with debts which would be provable under section 63(a) of this Act, * * *."

* Public Law No. 296, 73d Congress (H. R. 5884).

Of this amendment it may be said, as this Court said of section 74(a) in the *Manhattan Properties* case, that it was enacted to permit reorganizations not theretofore possible and that there is here likewise no evidence to support the view that the clause was merely declaratory of the law as understood by Congress.

In fact, these amendments would seem to indicate that Congress regarded it as necessary to *add* to the statute provisions for claims for future rent on the theory that they were not already in the statute.

However, whatever may be the conclusions to be drawn from the additions of sections 74(a) and 77B (b), any doubt is resolved by the other amendment effected by the Act of June 7, 1934, in the form of certain additions to section 63(a) of the Bankruptcy Act. This section of the Act is the one which enumerates debts which may be proved in ordinary bankruptcy proceedings, as distinguished from the new proceedings provided for by sections 73 to 76 inclusive and section 77B. Section 63(a) is the section which is pertinent to the instant claim inasmuch as the estate at bar was administered under the Bankruptcy Act as it was formerly constituted.

The Act of June 7, 1934 added to section 63(a) clauses 6, 6½ and 7 as follows:

> Debts of the bankrupt may be proved and allowed against his estate which are * * * (6) founded upon an award of an industrial accident commission, or other commission, body or officer, of any State or Territory having power or jurisdiction to make awards as workmen's compensation in case of injury or death for injury prior to adjudication; (6½) the amount of any damages, as evidenced by a judgment of a court of competent jurisdiction, in any action for negligence instituted prior to adjudication of defendant in such action in bankruptcy and pending at the time of the filing of petition in bank-

ruptcy, whether voluntary or involuntary; and (7) *claims for damages respecting executory contracts including future rents whether the bankrupt be an individual or a corporation, but the claim of a landlord for injury resulting from the rejection by the trustee of an unexpired lease of real estate or for damages or indemnity under a covenant contained in such lease shall in no event be allowed in an amount exceeding the rent reserved by the lease, without acceleration, for the year next succeeding the date of the surrender of the premises plus an amount equal to the unpaid rent accrued up to said date*: Provided, That the court shall scrutinize the circumstances of an assignment of future rent claims and the amount of the consideration paid for such assignment in determining the amount of damages allowed assignee hereunder: Provided further, That the provisions of this clause (7) shall apply to estates pending at the time of the enactment of this amendatory Act." (Italics ours.)

Clause (7), providing for rent claims, was intended to constitute a new and additional kind of debt which might be proved against the bankrupt estate. This is manifest from several considerations.

(a) *The Context of the Act of June 7, 1934.*

It is first manifest from the context. Workmen's compensation claims had never theretofore been provable in bankruptcy (*Lane* v. *Industrial Commissioner,* 54 F. (2) 338, 342, certiorari denied on jurisdictional grounds, 286 U. S. 543). Similarly, damages for tort injuries based upon negligence had never theretofore been provable except where reduced to judgment prior to the filing of the petition in bankruptcy (*Schall* v. *Camors,* 251 U. S. 239). Both types of claim are made provable by the new clauses (6) and (6½) respectively. Immediately following these two new

types of provable debts comes the new clause (7), making provision for claims based upon "executory contracts including future rents".

Moreover, such future rent claims are to be provable "whether the bankrupt be an individual or a corporation". Yet, as we have seen, Congress had already made provision for rent claims in section 74(b) in respect of extensions or compositions for individuals, and the amendment of June 7, 1934 was subsequent to the decision in the *Manhattan Properties* case, in which it was held that section 74(b) was not declaratory of the law as theretofore existing.

Again, the amendment limited proofs of debt by providing that such claims "shall in no event be allowed in an amount exceeding the rent reserved by the lease, without acceleration, for the year next succeeding the date of the surrender of the premises", of itself a novel limitation not theretofore found in section 63(a) or any other part of the Bankruptcy Act as formerly constituted.

(b) *Congressional Reports.*

That clause (7) was intended to constitute a new and additional kind of provable debt is further manifest from the Congressional reports.

Clause (7), although in briefer form, was in the Act of June 7, 1934 from the time it was first introduced in the House of Representatives as Bill No. 5884.* The Bill was referred to the Committee on the Judiciary, which submitted to the House a comprehensive report (Report No. 194, 73d Congress, First Session). The amendments to section 63(a), including clause (7), were referred to under the illuminating heading—*"Changes in Existing Law."* (Italics ours.)

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* Clause (7) in the original Bill read:

"Claims for damages respecting executory contracts including future rents whether the bankrupt be an individual or a corporation, which claims shall be liquidated under section 63(b) of this act."

House Report No. 194 was reprinted and submitted to the Senate in Senate Report 482 (73d Congress, Second Session) and therein adopted as part of the report of the Senate Committee.*

Finally, in the Statement of the Managers on the Part of the House, annexed to the Conference Report accompanying said Bill (H. R. Report No. 1773, 73d Congress, Second Session), appears the following statement with respect to clause (7) of section 63 (a):

> "As agreed upon by the conferees, *such claims are permitted to be provable claims*, provided that in no event shall a claim for damages be allowed in an amount exceeding the rent reserved by the lease for 1 year after surrender of the premises, plus the unpaid rent accrued to said date." (Italics ours.)**

It is therefore clear that it was the intent of both the House and the Senate to regard the amendments in question to section 63 (a), including clause (7), *as effecting changes in the law as it then existed.* In other words, there was no thought in either house of Congress that it was merely declaring the then present law.

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* The Senate Committee report recommended that in lieu of the words in 63 (a) (7): "which claims shall be liquidated under section 63 (b) of this act", there be inserted the words "but the claim of a landlord for anticipatory breach of an unexpired lease of real estate shall in no event be allowed in an amount exceeding the rent reserved by the lease for the year next succeeding the date of the surrender of the premises."

** The Conference Report recommended, in lieu of the amendment contained in Senate Report 482, the following: "but the claim of a landlord for injury resulting from the rejection by the trustee of an unexpired lease of real estate or for damages or indemnity under a covenant contained in such lease shall in no event be allowed in an amount exceeding the rent reserved by the lease, without acceleration, for the year next succeeding the date of the surrender of the premises plus an amount equal to the unpaid rent accrued up to said date: Provided, That the court shall scrutinize the circumstances of an assignment of future rent claims and the amount of the consideration paid for such assignment in determining the amount of damages allowed assignee hereunder: Provided further, That the provisions of this clause (7) shall apply to estates pending at the time of the enactment of this amendatory Act." The Bill was passed with this language.

(c) *The Act of June 18, 1934.*

That clause (7) was intended to constitute a new and additional kind of provable debt is finally manifest from the Act of June 18, 1934.

By the Act of June 7, 1934 the new clause (7) had been made applicable to estates pending at the time of the enactment of the Act. On June 18, 1934, there was passed a further amending Act which added at the end of clause (7) the words, "in which the time for filing such claims has not expired", so that the last sentence read:

> "Provided further, That the provisions of this clause (7) shall apply to estates pending at the time of the enactment of this amendatory Act in which the time for filing such claims has not expired."

Of this amendment Senate Report No. 1404 (73d Congress, Second Session) gave the explanation:

> "The committee is of opinion that the provisions of clause (7), quoted above, should be limited in operation to those estates in which the time for filing claims has not expired. If applied to estates in which the time for filing claims has expired, these provisions would entail much inconvenience, expense, and confusion, in many cases necessitating the reopening of estates which are ready for final settlement and in which the time for filing claims expired many months ago. The sole purpose of this bill (S. 3779) is to avoid such undesirable results of the provisions of clause (7)."

If clause (7) had been merely declaratory of the law as theretofore existing, the Act of June 18, 1934 would not have been necessary.*

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* The time for filing claims in the instant estate expired March 30, 1933, the date of adjudication having been September 30, 1932 (*cf.* R. 1; Bankruptcy Act, Section 57 (n)).

It therefore would seem obvious that clause (7) adds new matter to the Bankruptcy Act. It adds, among others, claims for damages respecting "executory contracts including future rents", and then goes on:

> "but the claim of a landlord for injury resulting from the rejection by the trustee of an unexpired lease of real estate or for damages or indemnity under a covenant contained in such lease"

shall be limited as provided.

Congress therefore used the words "claims for damages respecting executory contracts including future rents" to mean, among other things, claims "for damages or indemnity under a covenant contained in such lease." What is to be particularly emphasized is that Congress expressly deemed that it was adding, as a theretofore non-provable claim, a claim for damages which arises from *a covenant in the lease.*

It must therefore have been the thought of Congress that claims for such damages, even though expressly covenanted for, were not theretofore provable in bankruptcy.

It was pointed out by this Court in the *Manhattan Properties* decision (at p. 332) that the sole inquiry "is the intent of the Act."

In construing an act of Congress which has been amended subsequent to the inception of a controversy, resort may be had to future amendments in determining the intent of Congress existing prior to those amendments (*Cope* v. *Cope,* 137 U. S. 682; *Dunbar* v. *Dunbar,* 190 U. S. 340; *Wetmore* v. *Markoe,* 196 U. S. 68). In other words, the intent of Congress is not infrequently gauged from the vantage point of subsequently enacted legislation. So gauged, it is manifest that the existence of an express covenant in the instant lease added nothing to the substance or breadth of any claim upon such lease arising.

II.

All other considerations apart, the instant clause would not in any event give rise to a provable claim.

We now assume, for the purposes of the instant discussion, that a landlord and a tenant may turn an otherwise non-provable claim into a provable claim by the device of stipulating that, in the event of the bankruptcy of the tenant, the lease shall *ipso facto* terminate, and the tenant thereupon be liable to pay liquidated damages. The question is then presented as to whether the instant clause will serve.

It will be first observed that the clause at bar does not provide for liquidated damages in the strictest sense of the word. It rather provides for a formula by which the stipulated damages are to be ascertained. This formula consists of a minuend, to wit, "an amount equal to the amount of the rent reserved in this lease for the residue of the term hereof", and a subtrahend, to wit, "the fair rental value of the premises for the residue of said term." The figure resulting from the subtraction of the subtrahend from the minuend is to constitute the stipulated damages of the landlord.

It is of course obvious that if either the minuend or the subtrahend is unacceptable as a basis for a provable claim in bankruptcy, the formula itself is unacceptable. It is here contended that *both* the minuend and subtrahend clauses are unacceptable.

(1) *The Minuend Clause Sounds in Penalty and Is Therefore Unacceptable.*

As has been pointed out, the minuend clause of the formula is "an amount equal to the amount of the rent reserved in this lease for the residue of the term hereof."

There is no provision for discounting this figure to its present value. In consequence, the basic figure of the formula, being necessarily more than compensatory and therefore disproportionate to the loss, sounds as a penalty.

The court below was sensible of this difficulty, for it said (R. 33):

> "* * * but there is one doubt that does arise: whether the clause is for a penalty because the future payments are not discounted to their present values. If the lessee must pay at once the sum of a series of installments, each consisting of the difference between the rent reserved on successive rent days, and the estimated rent which will have been received on those days, the recovery will surely be more than compensatory. The present value of such an installment, payable twenty years hence, is very much less than its face."

The opinion then refers to this Court's decision in *Kothe* v. *R. C. Taylor Trust, supra,* in which a clause verbatim with the minuend clause at bar (there was however no subtrahend) was condemned as an unenforcible penalty, whose real design "was to insure to the lessor preferential treatment in the event of bankruptcy."*

The *Kothe* case dealt with a lease which had but fifteen *months* to run, and yet the provision for damages in the amount of the rent for those fifteen months was held to be "disproportionate to any damage reasonably to be anticipated in the circumstances disclosed."** Here the lease at the time of bankruptcy had upwards of twelve *years* to run.

That the purpose of the minuend clause here at bar was "to insure to the lessor preferential treatment in the event of bankruptcy" is made manifest from the fact that the cir-

* 280 U. S., at 227.
** 280 U. S., at 226.

cumstance which the lease provided should give rise to the so-called breach, and which would invoke its drastic formula for damages, bore no necessary reference to fault on the part of the tenant. Had an involuntary bankruptcy proceeding been filed against the tenant and subsequently dismissed for lack of merit, the formula for damages was nevertheless invoked. The tenant might not have been bankrupt and the petition against it most improvidently filed. Nevertheless, the lease would have come to an end, and the tenant would have been required to bear the burden of the formula. That such a result might ensue did not concern the landlord; his problem was to attempt to insure a claim provable in bankruptcy by making the date and filing of the petition the effective circumstance.

The decision below sought to avoid the result in the *Kothe* case by *interpreting into the language of the instant clause a discount provision*, the lease being thus allegedly construed in accordance with what the court below conceived to be "its patent general purpose to give the lessor indemnity and no more" (R. 34).

This Court did not attempt such a construction in the Kothe case, but condemned the clause as it was written. Nevertheless the court below, "to save the clause" (R. 34), supplemented the language of the lease at bar so as to hold that the proper measure of damages under its terms was "the sum of the *discounted* series of installments, each made up of the rent reserved, less the fair rental value for that period" (R. 34).

This was a result the court below was not free to reach, for, as was said by Mr. Justice (then Chief Judge) Cardozo in *Hermitage Co.* v. *Levine*, 248 N. Y. 333, 338:

> "If the damage clause as drawn gives inadequate protection, the fault is with the draftsman. The courts are not at liberty to supply its omissions at the expense of a tenant whose liability for the future

> ended with the cancellation of the lease except insofar as he bound himself by covenant to liability thereafter."

That language is applicable with even more force here, where the liability is that of the bankrupt's estate rather than that of the tenant personally, and where there are to be considered the interests of creditors rather than those of the tenant who made the promise.

We do not conceive that the subtrahend clause, even assuming it to be capable of application, can cure the vice in the minuend clause. The resultant figure after the application of the formula will always and necessarily reflect the excessive basis of the minuend clause.

(2) *Nor Is the Subtrahend Clause Susceptible of Valuation, and Therefore of Application.*

Even though we assume non-existent the vice of penalty in the minuend clause, there is encountered the insuperable difficulty of translating the subtrahend clause into a figure which may be used in the application of the formula.

In *Maynard* v. *Elliott, supra,* at page 278, the Court pointed out that not all contingent claims are provable, saying:

> "Or, the contingency may be such as to make any valuation of the claim impossible, *even though liability has attached.*" (Italics ours.)

There is not here presented a simple clause where the rental value of the premises is to be fixed as of a certain time, *e. g.,* the date of petition filed, or, as in *William Filene's Sons Co.* v. *Weed, supra,* the date of entry by the landlord. On the contrary, there is required to be subtracted from the minuend "the fair rental value of the premises for the residue of said term".

(a) *There Is Involved a Month by Month Inquiry for the Balance of the Term, Necessitating Resort to Speculation.*

If this subtrahend clause is to be interpreted as referring to the fair rental value as of the due date of each of the several instalments of rent, as would seem to be its meaning, the court will be projected into an inquiry which can only be resolved by the sheerest conjecture and speculation. The lease has twelve years to run. The rental is payable monthly (R. 7). Therefore in computing the subtrahend of the formula it will be necessary to make inquiry as to value for each of the monthly rent days for the twelve years to come.

The difficulties of such an inquiry were well stated by the court below itself in its decision in *In re Metropolitan Chain Stores, Inc.*, 66 F. (2d) 482, at page 484, where it was dealing with a claim for an anticipatory breach of a lease whose term had not begun at the date of petition filed. The court said (p. 484) that presumably the measure of damages would be "the difference between the rent stipulated in the lease and rent obtainable from other parties if the premises are relet" (*i. e.*, the rental value). The court continued:

> "In the case at bar the original term was not to begin until January 1, 1935, and was to run for thirty years thereafter. Whether during that distant period the landlord will profit or lose by reason of the prospective tenant's repudiation of his contract (assuming without decision that bankruptcy may be deemed such) is *pure speculation.*" (Italics ours.)

The application of such a formula readily seemed speculative to the court below where projected over thirty years. At bar it is only less so as a matter of degree. Valuation is impossible in either case, and hence in bankruptcy unacceptable.

(b) *Impossibility of Valuation Also Ensues Because of the Lease Provisions for Termination and Abatement of Rent.*

The fair rental value in the future cannot be estimated without also taking into consideration certain provisions of the lease *under which there may be no rent to pay.*

The lease provides (R. 9):

> "This Lease is made on condition that, in case the premises, or the estate of which they may form part, be in whole or in part destroyed or damaged by fire, or other unavoidable casualty, or if said estate be in whole or part taken by public authority for any public purpose, this lease may, at the election of the Lessor, be terminated; provided, that, if the same be not so terminated, a just and proportionate part of the rent shall be suspended or abated until the premises shall have been put by the Lessor in as good condition as at the date of such damage or taking; and the Lessee hereby assigns to the Lessor any and all claims and demands for damages on account of such taking."

In attempting to estimate the fair rental value of the premises month by month as instalments become payable in the future, it is inevitable that there be taken into consideration the fact that the payment of rent may be suspended or abated under the terms of the lease by the happening of any one of the several eventualities specified in the paragraph above quoted. Yet to do so is manifestly to make impossible any valuation of the claim.

The situation is much akin to that in *Dunbar* v. *Dunbar, supra,* where a claimant sought to prove against the estate of her bankrupt divorced husband a claim upon an alimony

agreement to pay her a stipulated sum "during her life, or until she marries". The court remarked (at p. 345):

> "But how can any calculation be made in regard to the continuance of widowhood where there are no tables and no statistics by which to calculate such contingency? How can a valuation of a probable continuance of widowhood be made? Who can say what the probability of remarrying is in regard to any particular widow? We know what some of the factors might be in the question; inclination, age, health, property, attractiveness, children. These would at least enter into the question as to the probability of continuance of widowhood, and yet there are no statistics which can be gathered which would tend in the slightest degree to aid in the solving of the question."

Like methods of calculation here are wanting as to destruction, or damage by fire or other unavoidable casualty, or condemnation by public authority, so that any basic certitude upon which could be predicated computation cannot be resorted to.

CONCLUSION.

It is respectfully submitted that the decision of the Circuit Court of Appeals for the Second Circuit should be reversed and the decision of the District Court of the United States, expunging the claim at bar, should be affirmed.

Respectfully submitted,

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